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THE [FEDERAL] CONSTITUTION OF CANADA.

THE British North America Act,^(a) which received the assent of the Queen on the 29th of March, 1867, and came into force by royal proclamation on the 1st of July in the same year, gave a constitutional existence to the dominion of Canada, which, at that time, comprised only the four provinces of Quebec and Ontario—previously known as Upper and Lower Canada—and Nova Scotia and New Brunswick. In the course of the succeeding six years, the provinces of British Columbia^(b) and Prince Edward Island^(c) were added to the Union, and a new province, under the name of Manitoba,^(d) carved out of the North-West Territory. This vast North-West Territory was, after the purchase of the rights of the Hudson's Bay Company in Rupert's Land, formally transferred to the Dominion by an imperial order in Council, on the 15th of July, 1870, and it is now divided into five provisional districts for the purposes of government, known as Keewatin, Assiniboia, Alberta, Saskatchewan, and Athabasca.^(e)

Previous to the passage of the British North America Act, all these provinces (with the exception of Manitoba—which, as just stated, was a subsequent creation—and the old

(a) Imp. Stat., 30 & 31 Vict. c. 3.

(b) Can. Stat., 1873, p. ix.

(c) *Ibid.* 1872, p. xxxiv.

(d) *Ibid.* 33 Vict. c. 3.

(e) See Imp. Stat., 31 & 32 Vict. c. 105; *Ibid.* 34 & 35 Vict. c. 28; Imp. Orders in Council, 1870, 1880 (Can. Stat., 1872 and 1881); Bourinot's "Manual of the Constitutional History of Canada," pp. 58-60, 105.

colony of British Columbia,(a) on the Pacific Coast), were in the possession of a complete system of parliamentary government, in all essential respects a transcript of the British system. Each province was governed by a Lieutenant-Governor, a Legislature of two Houses, and an Executive Council, whose members continued in office only so long as they possessed the support of the majority in the People's House. They had for years possessed complete control of their local and provincial affairs, subject only to the sovereignty of the Imperial State. In all the provinces the criminal law and the judicial system of England prevailed. The common law of England was also the basis of the jurisprudence of all the provinces, except Quebec, where a million and a-quarter of French-Canadian people were and are still speaking the French language, professing the Roman Catholic religion, and adhering to the *Coutume de Paris* and the general principles of the civil law, as they obtained it from their ancestors, who first settled the province of Canada. Accordingly, when the terms of Union came to be arranged in 1864 by delegates from the several provinces of British North America, it was found necessary to establish a federation bearing many analogies to that of the United States, in order to meet the wishes of the people of these provinces, especially of French Canada, and to preserve all those local institutions with which the people had long been familiar, and which they could not be induced, under any circumstances, to hand over to the sole control of one central Parliament. [The British North America Act simply sets forth, in its preamble, that the provinces "have expressed their desire to be federally united into one Dominion." It is to the resolutions passed by the Quebec Conference as the basis of union, that we must look for the positive assertion of those principles of Federal Union which can be seen in the distribution of powers between the Dominion

(a) This province, previous to its union with Canada, was governed by a Lieutenant-Governor and a nominated legislative Council; responsible government was one of the results of the Union. Bourinot's "Manual," p. 102.

and the Provincial Governments, as set forth in the federal constitution of the Dominion. These resolutions commence with the declaration that, "in a federation of the British American provinces, the system of Government best adapted, under existing circumstances, to protect the diversified interests of the several provinces, and to secure harmony and permanency in the working of the Union, would be a general Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections." The resolutions of the Quebec conference were embodied in addresses of the several Legislatures of the provinces to the Imperial Parliament. These resulted in the passing of the British North America Act of 1867, now the fundamental law of the whole Dominion, setting forth the territorial divisions, defining the nature of the executive authority, regulating the division of powers, directing to what authorities these powers are to be confided, and providing generally for the administration and management of all those matters which fall within the respective jurisdictions of the Dominion and the provinces. In accordance with this constitution, Canada has now control of the government of the vast territory stretching from the Atlantic to the Pacific to the north of the United States, and is subject only to the sovereignty of the Queen and the Parliament of Great Britain in such matters as naturally fall under the jurisdiction of the supreme and absolute authority of the sovereign State. In all matters of purely Canadian concern and interest, over which the Canadian Parliament has been given jurisdiction by the constitution of 1867, she has powers as plenary and absolute as are those possessed by the Imperial Parliament.

If we come to recapitulate the various constitutional authorities which now govern the Dominion in its external and internal relations as a dependency of the Crown, we

find that they may be divided for general purposes as follows:—

The Queen.

The Parliament of Great Britain.

The Judicial Committee of the Privy Council.

The Government of the Dominion.

The Governments of the Provinces.

The Courts of Canada.

While Canada can legislate practically without limitation in all those matters which do not affect Imperial interests, yet sovereign power, in the legal sense of the phrase, rests with the Government of Great Britain. Canada cannot of her own motion negotiate treaties with a foreign State, as that is a power only to be exercised by the sovereign authority of the empire. In accordance, however, with the policy pursued for many years towards self-governing dependencies—a policy now practically among the “conventions” of the constitution—it is usual for the Imperial Government to give all the necessary authority to distinguished Canadian statesmen to represent the Dominion interest in any conference or negotiations affecting its commercial or territorial interests. The control over peace and war still necessarily remains under the direct and absolute direction of the Queen and her great Council. The appointment of the Governor-General, without any interference on the part of the Canadian Government, rests absolutely with the Queen’s Government. The same sovereign authority may “disallow” any Act passed by the Parliament of Canada which may be repugnant to any Imperial legislation (a) on the same subject applying directly to the Dominion, or which may touch the relations of Great Britain with foreign Powers, or otherwise seriously affect the interests of the Imperial State. The Judicial Committee of the Queen’s Privy Council is the Court of last resort for Canada as for all other parts of the external empire, although that jurisdiction is only exercised

(a) Imp. Stat., 30 & 31 Vict. c. 3.

within certain limitations consistent with the large measure of legal independence granted to the Dominion. As it is from the Parliament of Great Britain that Canada has derived her constitution, so it is only through the agency of the same sovereign authority that any amendment can be made upon that instrument. [But, while that Parliament has the constitutional and legal authority to amend, or even destroy that instrument to-morrow,(a) it does not move in the direction of amendment except when formally addressed through the Queen by the Dominion Legislature. Having given a complete system of local self-government to the united provinces, the Imperial Parliament is restrained, practically if not theoretically, not only by the grant of powers formally made in the British North America Act, but by those principles, "conventions," and understandings which have been since 1839 laid down with respect to the internal administration of Colonial affairs, and which have now as much force as if they were incorporated in a statutory enactment. The sovereignty of Great Britain over her Colonies may then be considered latent, but liable to be called into action any moment the vital interests of the Empire are affected.]

The preamble of the British North America Act, 1867, sets forth that the provinces are "federally united," with a constitution "similar in principle to that of the United Kingdom." [Mr. Dicey has said with some truth in his excellent treatise on the "Law of the Constitution,"(b) that this statement is in a measure erroneous, since the constitution of Canada is modelled on that of the United States. No doubt the preamble is open to misconstruction since it ignores in words the fact that the federation of Canada in its general structure bears obvious resemblance to the main features of the federal system of the United States.] The model taken by Canadian statesmen was almost necessarily

(a) See Dicey's "Law of the Constitution," 3rd ed., pp. 106, 107.

(b) Third ed., p. 155; he uses the strong words "official mendacity" in this connection.

that of the most perfect example of federation that the world has yet seen, though they endeavoured to avoid its weaknesses in certain essential respects. At the same time, in addition to the general character of the provincial organisations and distribution of powers, and other important features of a federal system, there are the *methods of government*, which are copies, exact copies in some respects, of the Parliamentary government in England. We see this in the clauses of the British North America Act referring to the executive authority, the establishment of a Privy Council, and the constitution of the two Houses of the Dominion Parliament. More than that, we have, in conjunction with the legal provisions of the British North America Act, a great body of unwritten law; that is to say, that mass of "conventions," understandings, and usages (*a*) which have been long in practical operation in England and govern the relations between the Crown and its advisers, the position of the Ministry and its dependence on the Legislature, and otherwise control and modify the conditions of a system of English Parliamentary government.

[Before I proceed to enumerate the legislative powers of the Dominion and the provincial Governments respectively, as these are set forth in the fundamental law [and defined by the Courts so far as cases of conflict have arisen,] it will probably give greater clearness to this review, if I state the nature of the various authorities under which the government of the country is carried on. These may be defined as follows:—

1. The Queen, in whom is legally vested the executive authority; in whose name all commissions to office run; by whose authority parliament is called together and dissolved; and in whose name bills are assented to or reserved. She is represented for all purposes of government by a Governor-General; appointed by Her Majesty in Council and holding office during pleasure; responsible to the Imperial Govern-

(a) See Freeman. "Growth of the English Constitution" (4th ed.), p. 114 *et seq.*

ment as an Imperial Officer ; having the right of pardon for all offences, but exercising this and all executive powers under the advice and consent of a responsible ministry.(a)

2. A Ministry composed of thirteen or more members of a Privy Council ;(b) having seats in the two Houses of Parliament ; holding office only whilst in a majority in the popular branch ; acting as a Council of advice to the Governor-General ; responsible to parliament for all legislation and administration.

3. A Senate composed of seventy - eight members appointed by the Crown for life, though removable by the House itself for bankruptcy or crime ; having co-ordinate powers of Legislation with the House of Commons, except in the case of money or tax bills which it can neither initiate nor amend ; having no power to try impeachments ; having the same privileges, immunities, and powers as the English House of Commons when defined by law.(c)

4. A House of Commons of two hundred and fifteen members, elected for five years on a very liberal Dominion Franchise in electoral districts fixed by law in each province ; liable to be prorogued and dissolved at any time by the Governor-General on the advice of the Council ; having alone the right to initiate money or tax bills ; having the same privileges, immunities, and powers as the English House of Commons when defined by law.(d)

5. A Dominion Judiciary composed of a Supreme Court of five judges, acting as a Court of Appeal for all the Provincial Courts ; subject to have its decisions reviewed on appeal by the Judicial Committee of the Queen's Privy Council in England ; its judges being irremovable except for cause, on the address of the two Houses to the Governor-General.(e)

The several authorities of government in the provinces may be briefly described as follows :—

1. A Lieutenant-Governor appointed by the Governor-

(a) B.N.A. Act, 1867, §§ 9, 10-12, 13, 14, 15.

(b) *Ibid.* § 11.

(c) B.N.A. Act, 1867, §§ 21-36.

(d) B.N.A. Act, 1867, §§ 37-39, 44-52.

(e) *Ibid.* §§ 96-101. Can. Stat., 38 Vict. c. 11.

General in Council, practically for five years; removable by the same authority for cause; exercising all the powers and responsibilities of the head of an executive, under a system of parliamentary government; having no right to reprieve or pardon criminals.(a)

2. An Executive Council in each province, composed of certain heads of departments, varying from five to twelve in number; called to office by the Lieutenant-Governor; having seats in either branch of the local legislature; holding their positions as long as they retain the confidence of the majority of the people's representatives; responsible for and directing legislation; conducting generally the administration of public affairs in accordance with the law and the conventions of the constitution.(b)

3. A Legislature composed of two Houses—a Legislative Council and an Assembly—in four provinces, and of only an Assembly or elected House in the other three provinces. The Legislative Councillors are appointed for life by the Lieutenant-Governor in Council, and are removable for the same reasons as Senators; [must have a property qualification, except in Prince Edward Island (where the Upper House is elective)]; cannot initiate money or tax bills, but otherwise have all powers of legislation; cannot sit as Courts of Impeachment. The Legislative Assemblies are elected for four years in all cases, except in Quebec, where the term is five; liable to be dissolved at any time by the Lieutenant-Governor, acting under the advice of his Council; elected on manhood suffrage in Ontario and Prince Edward Island, and on a scarcely less liberal franchise in the other sections.(c)

4. A Judiciary in each of the provinces, appointed by the Governor-General in Council; only removable on the address of the two Houses of the Dominion Parliament.(d)

As regards the territories of the North-West, it is

(a) B.N.A. Act, 1867, §§ 58-62, 66, 67.

(b) B.N.A. Act, 1867, §§ 63-66.

(c) B.N.A. Act, §§ 69-90.

(d) *Ibid.* §§ 96-100.

provided by the British North America Act that the Dominion is to exercise complete Legislative control. As previously stated, they have been divided into five districts for purposes of government. Keewatin is under the control of the Government of Manitoba, but will only be continued in this position until the question of boundaries is finally settled. The other districts are governed by a Lieutenant-Governor and an Assembly elected by the people in accordance with the statutes passed by the Dominion Parliament. The Lieutenant-Governor is appointed by the Governor in Council, and holds office on the same tenure as the same officials in the provinces; but responsible government in the complete sense of the term does not yet exist in the territories. They are represented, however, both in the Senate and House of Commons of Canada.(a)

Coming now to the distribution of powers between the Dominion and the Provincial authorities, we find that they are enumerated in sections 91, 92, 93, and 95 of the fundamental law. The 91st section gives exclusive jurisdiction to the Parliament of the Dominion over all matters of a general or Dominion character, and section 92 sets forth the exclusive powers of the provincial organisations. The classes of subjects to which the exclusive authority of the Dominion Parliament extends are enumerated as follows in the Act:—

The public debt and property.

The regulation of trade and commerce.

The raising of money by any mode or system of taxation.

The borrowing of money on public credit.

Postal service.

The census and statistics.

Militia, military, and naval service and defence.

The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

Beacons, buoys, lighthouses, and Sable Island.

Navigation and shipping.

(a) Rev. Stat. of Canada, c. 50.

Quarantine and the establishment and maintenance of marine hospitals.

Sea-coast and inland fisheries.

Ferries between a province and a British or foreign country, or between two provinces.

Currency and coinage.

Banking, incorporation of banks, and the issue of paper money.

Savings banks.

Weights and measures.

Bills of exchange and promissory notes.

Interest.

Legal tender.

Bankruptcy and insolvency.

Patents of invention and discovery copyrights.

Indians and lands reserved for the Indians.

Naturalisation and aliens.

Marriage and divorce.

The criminal law, except the constitution of the Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

The establishment, maintenance, and management of penitentiaries ; and lastly,

Such classes of subjects as are expressly excepted in the enumeration of the subjects assigned by the Act exclusively to the Legislatures of the provinces.

On the other hand, the exclusive powers of the provincial Legislatures extend to the following classes of subjects :—

The amendment from time to time, notwithstanding anything in the Act, of the constitution of the province, except as regards the office of Lieutenant-Governor.

Direct taxation within the province in order to the raising of a revenue for provincial purposes.

The borrowing of money on the sole credit of the province.

The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.

The management and sale of the public lands belonging to the province, and of the timber and wood thereon.

The establishment, maintenance, and management of public and reformatory prisons in and for the province.

The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the provinces other than marine hospitals.

Municipal institutions in the province.

Shop, saloon, tavern, and auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.

Local works and undertakings *other than* such as are of the following classes :—

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other of the provinces, or extending beyond the limits of the province ;

(b) Lines of steamships between the province and any British or foreign country ;

(c) Such works as, though wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The incorporation of companies with provincial objects.

Solemnisation of marriage in the province.

Property and civil rights in the province.

The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects above enumerated.

Generally all matters of a merely local or private nature in the province.

Then, in addition to the classes of subjects enumerated in the sections just cited, it is provided by section 93 that the Legislatures of the provinces may exclusively legislate on the subject of education, subject only to the power of the Dominion Parliament to make remedial laws in case of the infringement of any legal rights enjoyed by any minority in any province at the time of the Union—a provision intended to protect the separate schools of the Roman Catholics and the Protestants in the provinces. The Dominion and the provinces may also concurrently make laws in relation to immigration and agriculture, provided that the Act of the province is not repugnant to any Act of the Dominion Parliament; and under section 94 the Dominion Parliament may provide for the uniformity of laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick.

[Having thus described the Federal machine, I shall in a subsequent paper call attention to some of the difficulties which have arisen in working it, and to the interpretations placed by the Courts upon the Constitution.]

J. G. BOURINOT.

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